



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 245

[Docket DARS-2016-0035]

RIN 0750-AJ11

Defense Federal Acquisition Regulation Supplement: Use of the Government Property Clause (DFARS Case 2015-D035)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to expand the prescription for using the Federal Acquisition (FAR) Government property clause.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 571-372-6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 81 FR 73002 on October 21, 2016, to amend DFARS 245.107(1)(i) to require the use of FAR clause 52.245-1, Government Property, in

all purchase orders for repair, maintenance, overhaul, or modification of Government property, regardless of the unit acquisition cost of the items to be repaired. One respondent submitted comments in response to the proposed rule.

II. Discussion and Analysis

A. Summary of Significant Changes from the Proposed Rule

There are no changes from the proposed rule.

B. Analysis of Public Comments

1. Support for Continued Discretionary Use of the FAR clause

Comment: The respondent recommends that DFARS 245.107 be left “as is” and that contracting officers should insert FAR clause 52.245-1 into purchase orders for repair based on the type and cost of property to be repaired.

Response: A determination for when provisions and clauses are used is driven primarily by the goods or services being procured and the type of contract being contemplated. Tying the use of FAR 52.245-1 to only some forms of Government-furnished property (GFP) and not others would be impractical given the variety of property classes, types, values, uses, and conditions.

Discretion, in the case of inserting FAR clause 52.245-1 in purchase orders for repair, has led to inconsistent treatment of GFP. Moreover, the discretionary use of FAR 52.245-1 has been shown to drive process inconsistency, compromise accountability, and promote nonstandard processes. This complicates the

administration of contracts, particularly upon contract closeout when proper disposition and adjudication of remaining Government property is crucial.

2. Training for Contracting Officers

Comment: The respondent also stated that appropriate training should be provided to contracting officers on use of the Government property clause, rather than require a blanket prescription that fails to incorporate materiality.

Response: The purpose of this rule is to achieve greater accountability of GFP, decrease the risk of misuse or loss of Government property, and mitigate potential ownership issues. As stated previously, tying the use of FAR clause 52.245-1 to a specific property class or type would be impractical given the variety of property types, values, uses, and conditions. By extension, training contracting officers on the potential materiality of asset types relative to the use FAR clause 52.245-1 would be unrealistic and ultimately exacerbate the accountability gap this rule seeks to close.

3. Impact to Small Business

Comment: The respondent states the rule would adversely impact small business participation in repair, maintenance, and calibration activities, and that small businesses would be required to implement costly property systems to comply with the

Government property clause and associated DFARS clauses invoked by its use.

Response: Many small businesses that do business with the Federal Government have well-established property management systems by virtue of existing purchase orders for repair or other contracts that contain FAR clause 52.245-1. Further, many of the requirements contained in FAR 52.245-1, e.g., receiving reports, discrepancy reports and property records, are typical commercial practices, and so not unduly burdensome. For example, customary commercial practice is to create receiving reports and keep records for incoming assets regardless of the source of such assets. In addition, the policy at FAR 45.103(b) permits contractors to use their own existing property management procedures, practices, and systems to account for and manage Government property.

4. Need for Further Analysis by DoD

Comment: The respondent states that DoD should perform further analysis to ensure that its proposal is cost effective, and that the Government should ensure that cost savings from greater tracking of Government property included in contracts that meet the simplified acquisition threshold outweighs the increased cost of repair and possible contracting delays.

Response: This rule is part of a larger DoD effort to resolve DoD's material weakness relative to Government furnished

property and accountability of assets is an important part of audit readiness.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule applies to purchase orders awarded for repair, overhaul or maintenance of equipment, including, commercial items and commercially available off-the-shelf items. This includes purchase orders awarded under FAR part 12 procedures, where the value of repair, overhaul or maintenance services is at or below the simplified acquisition threshold. This rule does not apply to contracts for the acquisition of supplies, to include commercial items and commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory

action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. E.O.13771

This final rule is not subject to E.O. 13771, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

The objective of this rule is to strengthen the management and accountability of Government-furnished property (GFP) by amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require that Federal Acquisition Regulation (FAR) clause 52.245-1, Government Property, be incorporated in all DoD purchase orders involving repair, maintenance, overhaul, or modification of Government property. This rule is necessary because the current language at FAR 45.107 provides an exception whereby contracting officers can choose not to include the clause in purchase orders for repairs of GFP, when the unit acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold (SAT). Acquisition value alone, however, is not an indicator of the criticality or

sensitivity of the property. As an example, the acquisition cost of individual items of firearms, body armor, night-vision equipment, computers, or cryptologic devices may be below the SAT, but the accountability requirements for these items are fairly stringent. Omission of the Government property clause in purchase orders for repairs of these types of items increases the risk of misuse or loss of the property and could call into dispute their ownership.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will apply to small businesses that are awarded purchase orders for repair of Government property, where such purchase orders did not previously contain FAR clause 52.245-1. According to data available in the Federal Procurement Data System for fiscal year 2015, DoD awarded 735 purchase orders involving the repair of Government property at or below the SAT to 530 unique vendors, of which 328 (approximately 56% percent) were small businesses.

Entities affected by this rule would be required to prepare a property record and receiving report for the GFP provided. Additionally, entities would be required to acknowledge receipt of assets in the Wide Area WorkFlow system. The professional skill sets required are those of mid-level administrative personnel.

DoD did not identify any significant alternatives to the rule that would have less impact on small businesses and still achieve accountability of GFP and resolve potential risks of loss or disputes for the ownership of property acquired with Government funds.

VII. Paperwork Reduction Act

This rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0704-0557, entitled DFARS Part 245; Use of the Government Property Clause for Repair of Government-furnished Property.

List of Subjects in 48 CFR Part 245

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR 245 is amended as follows:

PART 245—GOVERNMENT PROPERTY

1. The authority citation for part 245 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 245.107 by—

- a. Removing paragraph (6);
- b. Redesignating paragraphs (1) through (5) as paragraphs (2) through (6), respectively; and
- c. Adding a new paragraph (1).

The addition reads as follows:

245.107 Contract clauses.

(1)(i) In lieu of the prescription at FAR 45.107(d), use the clause at FAR 52.245-1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of Government property regardless of the unit acquisition cost of the items to be repaired.

(ii) For negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data for which Government property is provided, use the clause at FAR 52.245-1, Government Property, without its Alternate I.

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[FR Doc. 2019-08481 Filed: 4/29/2019 8:45 am; Publication Date: 4/30/2019]